

32

Office - Supreme Court, U. S.  
FILED  
AUG 29 1942  
CHARLES ELMORE COSLEY  
CLERK

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM 1942

Number **349**

■

DAISY LARGENT  
*Petitioner*

v.

JACK REEVES, CITY MARSHAL  
*Respondent*

■

**Petition for Writ of Certiorari to the  
Court of Criminal Appeals of Texas**

HAYDEN C. COVINGTON  
*Attorney for Petitioner*



# INDEX

## SUBJECT INDEX

	PAGE
Summary Statement of Matters Involved .....	1-10
Preliminary Statement .....	1
Statutory Provision Sustaining Jurisdiction .....	3
Validity of the City Ordinance and the State Statute Drawn in Question .....	3
Date of Judgment and Order to be Reviewed .....	5
Time and Manner in which Questions Raised Below .....	5
Opinions of the Courts Below .....	7
Statement of Facts .....	7
Questions Presented .....	10
Reasons Relied on for Allowance of Writ .....	11
SUPPORTING BRIEF .....	14-23
Specification of Errors .....	14
Argument .....	15

## CASES CITED

Amarillo, City of, v. Tutor 267 S. W. 697, 199 S. W. 352 .....	7
Baker, Ex parte 78 S. W. 2d 610 .....	19
Brinkerhoff-Faris Trust & Sav'gs Co. v. Hill 281 U. S. 673-675, 677-678 .....	7
Brown v. Mississippi 297 U. S. 278 .....	20

# CASES CITED

	PAGE
Burnes v. State	
75 Tex. C. R. 188, 170 S. W. 550 .....	7
Cain, Ex parte	
56 Tex. C. R. 538, 120 S. W. 999 .....	5
Calhoun, Ex parte	
91 S. W. 2d 1047 .....	5
Carlson v. California	
310 U. S. 106 .....	16
Carter, Ex parte	
156 S. W. 2d 986 .....	9, 18, 19
Cox, Ex parte	
53 Tex. C. R. 240, 109 S. W. 369 .....	5
Davis v. Wechsler	
263 U. S. 22, 24 .....	20
Dobbins v. Los Angeles	
195 U. S. 223 .....	17
Eubank v. Richmond	
226 U. S. 137 .....	16
Faulkner, Ex parte	
158 S. W. 2d 525 .....	11, 19
German Sav'gs & Loan Soc. v. Dormitzer	
192 U. S. 125, 128 .....	20
Gibbons v. Ogden	
9 Wheat. 1, 210 .....	17
Gohlman v. Whittle	
273 S. W. 808 .....	7
Hague v. C. I. O.	
307 U. S. 496, 501, 518 .....	11, 15
Hoffman v. State	
20 S. W. 2d 1057 .....	7
Jacobson v. Massachusetts	
197 U. S. 11, 25 .....	17
Jones, Ex parte	
81 S. W. 2d 706 .....	11, 19

# CASES CITED

	PAGE
Jones v. City of Opelika	
62 S. Ct. 1231 .....	16, 22
Lewis, Ex parte	
45 Tex. C. R. 1, 73 S. W. 811 .....	19
Lewis, Ex parte	
147 S. W. 2d 478 .....	11
Love v. Griffith	
266 U. S. 32 .....	20
Mato, Ex parte	
19 Tex. C. R. 112 .....	5
Missouri, K. & T. Ry. Co. v. Baber	
169 U. S. 613, 626 .....	17
N. Y. Central Ry. Co. v. N. Y. & Penn'a	
270 U. S. 124, 126, 127 .....	20
Panhandle E. Pipe Line Co. v. St. H'way Comm.	
294 U. S. 613, 622 .....	16
Patterson, Ex parte	
42 Tex. C. R. 256, 58 S. W. 1011 .....	5, 19
Patterson v. Alabama	
294 U. S. 600, 603-607 .....	20
People ex rel. Bryant v. Zimmerman	
278 U. S. 63, 66-69, 70-71 .....	7, 20
Postal Tel. Cable Co. v. Newport	
247 U. S. 464, 473, 475-476 .....	20
Rogers v. Alabama	
192 U. S. 226, 230, 231 .....	20
Roquemore, Ex parte	
131 S. W. 1101 .....	19
Schneider v. State	
308 U. S. 147 .....	11, 15, 16, 18
Sinot v. Davenport	
22 How. 227, 243 .....	17
Slawson, Ex parte	
141 S. W. 2d 609, 610 .....	11, 19

## CASES CITED

	PAGE
Smith v. Texas	
233 U. S. 630 .....	17
Southern Ry. Co. v. Virginia	
290 U. S. 190 .....	16
Spelce, Ex parte	
119 S. W. 2d 1033, 1037 .....	11, 19
Thornhill v. Alabama	
310 U. S. 88 .....	16
Travis, Ex parte	
123 Tex. C. R. 480, 473 S. W. 483, 489 .....	5
Walrod, Ex parte	
120 P. 2d 783 .....	21
Walsh, Ex parte	
59 Tex. C. R. 409, 129 S. W. 118 .....	5
Weaver v. Palmer Bros. Co.	
270 U. S. 402 .....	17
Winnett, Ex parte	
121 P. 2d 312 .....	21

## STATUTES CITED

Paris (Texas) city ordinance No. 922 .....	3-4, 10, 14
Texas Code of Criminal Procedure, 1925	
Article 53 .....	11, 14
United States Code Annotated	
Title 28, sec. 347 (a)	
[Judicial Code, sec. 240 (a)] .....	23
United States Constitution	
Amendment I .....	10, 14
Amendment XIV, sec. 1 .....	10, 11, 14

## MISCELLANEOUS CITATIONS

Freund, <i>The Police Power</i> , p. 133 .....	16
Texas Jurisprudence, Vol. 9, p. 469 .....	7

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

## Number



DAISY LARGENT

*Petitioner*

v.

JACK REEVES, CITY MARSHAL

*Respondent*



## Petition for Writ of Certiorari of the Court of Criminal Appeals of Texas

To the SUPREME COURT OF THE UNITED STATES:

Daisy Largent, petitioner, presents this her petition for writ of certiorari and shows unto the Supreme Court of the United States the following:

### A

#### Summary Statement of Matters Involved

##### 1. *Preliminary Statement.*

With this petition are filed two companion cases, *Mrs. John Hilley, petitioner, v. Wid Spivey, Sheriff, Respondent*, and *Tully B. Killam, petitioner, v. City of Floresville, respondent*, brought here also from the Court of Criminal Appeals of Texas. The city ordinances under which petitioners were convicted are essentially different in their terms. The Comanche ordinance in the *Hilley* case is a

license tax law. The Floresville ordinance in the *Killam* case prohibits and makes unlawful peddling of literature on the public square and on any street within the city, being a prohibitory and not a regulatory ordinance, and does not provide for issuance of license or permit. The Paris ordinance in this case is also prohibitory, prohibiting the sale of literature at all times in the main business sections of the city of Paris. Section 3 of the ordinance in question makes unlawful and prohibits absolutely selling, offering for sale or even the exchange without price of any character of property, including literature containing information and opinion on the public square, known as the Plaza, and also on streets adjacent thereto. This includes all of the main streets of the city of Paris running from east to west and from north to south being twelve streets that "run into" and are adjacent to the Plaza or public square of the city. This includes all of the streets of the city where one would be able to contact the most people on Saturdays and evenings who come to the business section of the city for various purposes. There is little or no difference between this ordinance and the one involved in the *Killam* case (companion to this case). This ordinance is void on its face for the same reason as is the ordinance involved in the *Killam* case.

There is a common question in all three companion cases: That is the arbitrary, discriminatory denial of the writ of habeas corpus, contrary to the Fourteenth Amendment to the United States Constitution, and the common question of a fictitious and colorless non-federal question, which is intermingled with the federal question. These common questions make it appropriate to consider these three cases together. It is here requested that the Court read and consider the petition filed in this case, with supporting brief, together with the petitions and supporting briefs filed in the two above named companion cases. Although different disposition may be made in each of the three cases, it would



conserve time of the Court to consider the three together.

The ordinance here involved, as construed by the Texas courts, is identical with the ordinance involved in Numbers 13, 18 and 29, October Term 1939 in the case of *Schneider v. State*, 308 U. S. 147, and the holding of the Court of Criminal Appeals that the ordinance is valid on its face contradicts directly the holding by this Court in *Schneider v. State*, supra.

Under the practice allowed and established by the Court of Criminal Appeals of Texas, habeas corpus cases in a conviction of this sort are reviewable by the Court of Criminal Appeals if the ordinance is unconstitutional on its face, as construed by the Texas courts. It is admittedly unconstitutional and void on its face, under the *Schneider* case, supra, therefore the purported non-federal question relied upon in the Court of Criminal Appeals in the disposition of this case is fictitious and resorted to for the sole purpose of denying petitioner her constitutional rights, in violation of the equal protection and due process clauses of the Fourteenth Amendment.

## 2. Statutory Provision Sustaining Jurisdiction.

Section 240(a) of the Judicial Code, 28 U. S. C. A. 347(a) sustains jurisdiction.

## 3. Validity of the City Ordinance and the State Statute Drawn in Question.

The ordinance in question is Ordinance No. 922 of the City of Paris, Texas,<sup>1</sup> which reads as follows:

"Section 1. Be it ordained by the City Council of the City of Paris that the original Public Square as the same appears from donation to the town of Paris and the Plaza thereof is hereby designated as the Plaza.

"Section 2. That the lots and blocks embraced in the territory bounded on the south by the North boundary

<sup>1</sup> The City of Paris is a town of 18,678 population in northeastern Texas, 12 miles from Red River, the boundary line between Oklahoma and Texas, located in the black land, cotton farm district of Texas.

line of Sherman street, on the West by the East boundary line of 19th street, on the north by the South boundary line of Austin street, and on the east by the West boundary line of 20th street within the corporate limits of the City of Paris is hereby designated the Market Square.

*"Section 3.* It shall hereafter be unlawful for any person to sell, barter, exchange, or offer for sale, barter or exchange, any character of property whatever on the Plaza or streets adjacent thereto. The Plaza may be used subject to regulation and control by the Mayor and Police Department for the purpose of parking vehicles, and in order to avoid confusion, congestion and interference with traffic, the Police Department may by proper marking designate space for parking purposes.

*"Section 4.* That the Market Square be and the same is hereby dedicated to the use of producers of farm, garden, and orchard products, live stock, poultry, eggs, milk and butter under such regulations as may now be in force, as are herein provided or may hereafter be provided. Such sales shall be made from the vehicles by which such products are conveyed to the market square and by the Owner thereof or his Agent. Use of the space upon the Market Square for the purpose herein provided shall be prohibited except between the hours of 5 o'clock A.M. and 8:00 P.M., in order that the City may keep said Market Square in a neat, clean and sanitary condition.

*"Section 10.* Any person violating any of the provisions of this Ordinance shall be deemed guilty of a misdemeanor and upon conviction in the Corporation Court shall be subject to a fine in an amount of not less than FIVE DOLLARS, nor more than ONE HUNDRED DOLLARS."

The State statute, the validity of which is drawn in question, is Article 53 of the Code of Criminal Procedure of Texas, 1925, reading as follows:

"The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases. This article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court or county court at law, in which the fine imposed by the county court or county court at law shall not exceed one hundred dollars."

#### 4. *Date of Judgment and Order to be Reviewed.*

The order remanding petitioner to custody was affirmed by judgment of the Court of Criminal Appeals entered on April 8, 1942. (R. 35) Petitioner duly filed her motion for rehearing on April 17, 1942 (R. 36) and judgment overruling the motion was duly entered on June 3, 1942. (R. 49) Time for filing petition for certiorari expires September 3, 1942. Petition is filed within such time.

#### 5. *Time and Manner in which Questions Raised Below.*

In the application for writ of habeas corpus, petitioner alleged she was illegally restrained of her liberty. R. 1.

Under the law of Texas this particular allegation, without further statements, draws into question directly the constitutionality of the ordinance or law under which petitioner is held.<sup>2</sup>

At the habeas corpus hearing the state's attorney stated, with the approval of the district judge hearing the applica-

<sup>2</sup> *Ex parte Calhoun*, 91 S. W. 2d 1047; *Ex parte Travis*, 123 Tex. C. R. 480, 473 S. W. 483, 489; *Ex parte Cox*, 53 Tex. C. R. 240, 109 S. W. 369; *Ex parte Mato*, 19 Tex. C. R. 112; *Ex parte Cain*, 56 Tex. C. R. 538, 120 S. W. 999; *Ex parte Walsh*, 59 Tex. C. R. 409, 129 S. W. 118; *Ex parte Patterson*, 42 Tex. C. R. 256, 58 S. W. 1011.

tion: "The sole question is whether or not it is a valid ordinance." (R. 12, 16) Petitioner's attorney at the time evidence was offered stated that the evidence was offered for the sole purpose of showing the invalidity of the ordinance and that the petitioner was engaged in the activity of "sale of literature" and that any ordinance, regardless of how it is worded, that prohibits her right in doing that, is void. (R. 12) The court permitted the petitioner to introduce evidence for those purposes. R. 12.

The court permitted the *Watchtower* and *Consolation* magazines to be offered in evidence in proof of the activity of petitioner. R. 17.

In the Court of Criminal Appeals, under Propositions One and Two, petitioner attacked section 3 of the ordinance on its face because it prohibited the distribution of literature or the sale thereof, in excess of police power, which makes unlawful that which is, per se, lawful, and deprives petitioner of her right of freedom of press, contrary to the Fourteenth Amendment to Federal Constitution. R. 20, 21.

See footnote, page 22, *infra*.

Section 4 of the ordinance was expressly attacked under Proposition 4 in the Court of Criminal Appeals because it was void on its face in that it discriminated and conferred special privileges, contrary to the equal protection clause of the Fourteenth Amendment. R. 21.

Under Proposition 3 the entire ordinance was attacked as construed and applied because it denied and deprived petitioner of her rights of freedom of speech, press and worship, contrary to the Fourteenth Amendment. R. 21.

The Court of Criminal Appeals considered these federal questions above presented with reference to the claimed invalidity of the ordinance on its face, but as to the contention that the ordinance was unconstitutional and void as applied, they held that they did not have jurisdiction to consider said question. The federal questions were considered as properly presented as far as time and manner of raising

them was concerned in the trial court.<sup>3</sup> The questions were properly presented in the trial court in conformity with the Texas procedure in habeas corpus cases, and the questions were therefore sufficiently raised in the trial court and the Court of Criminal Appeals to require consideration by this Court. *People of New York ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 66-69, 70-71.

When the so-called non-federal question was injected into the case by the holding of the Court of Criminal Appeals that they did not have jurisdiction to consider the question of whether or not the ordinance was unconstitutional as construed and applied, petitioner filed her motion for rehearing, attacking, under grounds 3 and 5, Article 53 of the Code of Criminal Procedure of Texas, alleging that such statute, as construed and applied, denied her the inalienable right of the writ of habeas corpus, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The motion for rehearing timely presented this question. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U. S. 673-675, 677-678.

#### 6. *Opinions of the Courts Below.*

The trial courts did not render or file opinions. The Court of Criminal Appeals' opinion and dissenting opinion of Judge Graves, are reported in 162 S. W. 2d 419.

See Record, pages 24-35.

#### 7. *Statement of Facts.*

The pertinent parts of the complaint charging petitioner with an alleged violation of the foregoing ordinance read as follows:

<sup>3</sup> In Texas a constitutional question can be raised at any time and in any manner. *City of Amarillo v. Tutor*, 267 S. W. 697, 199 S. W. 352; *Hoffman v. State*, 20 S. W. 2d 1057; *Burnes v. State*, 75 Tex. C. R. 188, 170 S. W. 550; *Gohlman, etc. v. Whittle*, 273 S.W. 808. Texas Jur., Vol. 9, page 460.

"With force and arms did unlawfully offer for sale literature upon the Plaza of the City of Paris, Lamar County, Texas, within the corporate limits of the City of Paris, in violation of Ordinance 922 of the Ordinances of the City of Paris, Texas."

R. 5.

There are other allegations in the complaint but they are immaterial in view of the fact that petitioner was charged only with violation of Section 3 of Ordinance 922. At the trial in the District Court, the state's attorney stated that petitioner was arrested and imprisoned on a charge of violation of section 3 of ordinance Number 922. R. 13.

At the habeas corpus hearing before the District Court the ordinance was introduced in evidence. (R. 7-10, 17, 18) The capias profine on the judgment, assessing fine of \$100 plus \$13.20 costs, was offered in evidence. (R. 3, 4, 10) Judgment of the Corporation Court rendered upon the verdict, finding the petitioner guilty as charged, and assessing fine of \$1.00, was offered in evidence. (R. 10, 11) The warrant for arrest was introduced in evidence R. 11.

J. T. Evans, Jr., Recorder of the Corporation Court, testified that Daisy Largent was tried in Corporation Court on the 29th day of April, 1941, for distributing literature in or about and adjacent to the Plaza by offering for sale, literature; that she was charged with distributing, and offering for sale, literature in a prohibited area. (R. 11, 12) He identified the *Watchtower* magazine as one of the pamphlets distributed, which magazine was introduced in evidence. This is the same publication as that distributed by Mrs. John Hilley in one of the companion cases on the streets of Comanche, Texas. We have described the nature of this publication in the petition for writ of certiorari filed in the *Hilley* case and here refer to such description, page 7 of such petition for certiorari.

Jack Reeves, city marshal of Paris, testified that Daisy

Largent was in jail on June 10, 1941, when capias profine was served upon her. R. 15.

Daisy Largent testified that she was distributing, as an ordained minister of Jehovah God and one of Jehovah's witnesses, the *Watchtower* and *Consolation* magazines on the Plaza and streets adjacent to the Plaza. R. 16.

At the conclusion of the hearing the District Judge entered an order remanding petitioner to the custody of respondent to which action petitioner excepted and gave notice of appeal to the Court of Criminal Appeals and thereafter appeal was perfected to said Court of Criminal Appeals.

On November 17, 1941, petitioner's appeal was argued before the Court of Criminal Appeals, together with three companion cases involving Jehovah's witnesses, appealed to said Court in habeas corpus proceedings from the County Courts of Kerr, Comanche, Wilson and Lamar counties. There petitioner contended that the ordinance was unconstitutional and void both on its face and as construed and applied, because it discriminated and conferred special privileges, and denied petitioner of her rights of freedom of assembly, speech, press and worship, all contrary to the Fourteenth Amendment to the United States Constitution. The appeal in one of the companion cases, styled *Ex parte J. D. Carter* (156 S. W. 2d 986) from Kerr County Court, was reversed, the writ of habeas corpus granted, and relator Carter discharged, because the State statute under which he had been convicted was found to be unconstitutional on its face.

The Court of Criminal Appeals' disposition of the questions presented in this case is not based on an independent, non-federal ground, but the action of such court is a manifest subterfuge to avoid the decision of the federal question and to add to the denial of petitioner's rights. See footnote, page 22, *infra*. See decision on non-federal ground contained in the petition for writ of certiorari filed in companion case



of Daisy Largent. The majority opinion of the Court of Criminal Appeals intermingles the purported non-federal question to such an extent that it is dependent entirely upon the disposition of the federal question involved as to make necessary a review by this Court. That court holds that if the ordinance is unconstitutional on its face, then it has jurisdiction to consider and determine the question. That court found the ordinance to be valid on its face under the Federal Constitution. This makes necessary a review of the entire case.

## **B**

### **Questions Presented**

By reason of the foregoing, there were seasonably presented to the courts below and there now are presented to this Court for review substantial federal questions as follows:

1) Is the ordinance in question unconstitutional and void on its face because it is in excess of the police power and makes unlawful that which is, per se, innocent and lawful, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution?

2) Is the ordinance in question unconstitutional and void on its face because it denies and deprives petitioner of her right of freedom of the press in that it prohibits "press activity" on the main streets of the city, contrary to the First and Fourteenth Amendments to the United States Constitution?

3) Is the ordinance in question unconstitutional and void as construed and applied because it denies petitioner of her rights of freedom of speech, press and worship, contrary to the First and Fourteenth Amendments to the United States Constitution?

4) Is the ordinance in question unconstitutional and void on its face because it discriminates and confers special privileges upon one class of citizens and denies the same



privileges to other persons similarly situated, contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution?

5) Does Article 53 of the Code of Criminal Procedure of Texas, 1925, as construed and applied by the Court of Criminal Appeals of Texas, unduly deny petitioner of her right to the inalienable and inherent writ of habeas corpus in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

6) Did the Court of Criminal Appeals of Texas err in affirming the judgment of the trial court, remanding petitioner to custody of respondent?

## C

### Reasons Relied on for Allowance of Writ

This petition for writ of certiorari should be granted in sound discretion of this Court because the Court of Criminal Appeals and the trial court have decided important questions of constitutional law in a manner not applicable to and in conflict with decisions of this Court in the cases of *Schneider v. State*, 308 U. S. 147, and *Hague v. C. I.O.*, 307 U. S. 496, 501, 518. The ordinance in question is unconstitutional because it is an outright prohibition of the right to distribute literature containing information and opinion "in appropriate places." *Schneider v. State*, supra. See also *Ex parte Faulkner*, 158 S. W. 2d 525.

It is to be noticed that in the cases of *Ex parte Slawson*, 141 S. W. 2d 609, 610, *Ex parte Lewis*, 147 S. W. 2d 478, *Ex parte Jones*, 81 S. W. 2d 706, and *Ex parte Spelce*, 119 S. W. 2d 1033, 1037, that the Court of Criminal Appeals did not hold that it did not have jurisdiction. On the contrary, the matter of the contentions advanced were discussed and the cases were decided on their merits. The judgment here

entered disposed of the case on the merits and not on jurisdictional grounds; therefore the entire discussion of the opinion to the effect that the court does not have jurisdiction is immaterial, since the judgments of the trial courts were affirmed holding that petitioner was not denied her liberty in violation of the Constitution.

The questions presented as to the validity of the ordinance in question and the right to the writ of habeas corpus are of national importance and seriously affect the fundamental civil rights and personal rights of every person in the United States. The Court of Criminal Appeals has so far departed from the accepted and usual course of judicial procedure and decided an important federal question in such an arbitrary and "off hand" manner as to call for the exercise of this Court's power of supervision to halt the same.

As further reasons why this petition for writ of certiorari should be granted, we refer to the entire dissenting opinion of Judge Graves of the Court of Criminal Appeals in the case at bar, and make the same a part hereof as though copied at length herein. See the Record in this petition for certiorari, pages 28-35.

The ordinance on its face includes literature and therefore on its face and by its terms prohibits the distribution of literature within the business district of Paris and therefore is unconstitutional and void on its face and in direct conflict with the holding of this Court as to ordinances involved in Numbers 13, 18 and 29, October Term 1939, in *Schneider v. State*, supra, and *Hague v. C. I. O.*, supra.

It should be noticed that the ordinance here is prohibitory and not regulatory.

We further make reference to the petition for writ of certiorari filed in the companion case of *Hilley v. Spivey*.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Court of Criminal Appeals of Texas directing such court to certify to this Court for review and determination on a day certain to be therein

named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the decree of the said court affirming the judgment of the trial court be reversed and the judgments of the trial court be reversed and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

DAISY LARGENT

*Petitioner*

By HAYDEN C. COVINGTON

117 Adams Street

Brooklyn, New York

*Attorney for Petitioner*